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No. 02-749

IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant *certiorari* in a case in which several yet to be resolved material factual disputes render the single question presented by the petition for *certiorari* hypothetical in nature?

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INTRODUCTION

Hughes's petition for *certiorari* consistently resolves disputed facts and inferences in its favor in a transparent attempt to convince this Court that the Court of Appeals applied a novel theory of liability under the Americans with Disabilities Act in the proceedings below. In fact, in remanding this case to the district court for trial, the Court of Appeals merely applied this Court's well-established rules governing the denial of summary judgment in the face of material factual disputes regarding the question of discriminatory intent in an employment discrimination case.

The single question presented in Hughes's petition for *certiorari* reflects Hughes's unilateral, self-serving resolution of these factual disputes. The question presented by Hughes is necessarily hypothetical because a finder of fact could reasonably reject Hughes's version of the facts at trial. Under these circumstances, if this Court were to proceed to resolve the question presented in Hughes's petition for *certiorari*, it would require the Court to either resolve disputed facts and inferences in favor of Hughes or render Hughes an advisory opinion based on hypothetical facts.

As explained below, at this procedural juncture, Hughes's petition should be denied as unripe for this Court's review.

STATEMENT OF THE CASE

Joel Hernandez was only twenty-six-years-old when he started working as a janitor for Hughes in Tucson, Arizona on July 21, 1966. More than twenty-five years later when Mr. Hernandez voluntarily resigned from the Company on July 12, 1991, he had been promoted to the position of a Calibration Service Technician and was fifty-one-years-old.

When Mr. Hernandez resigned from Hughes in July of 1991, Hughes evaluated his work ability as "good," his work conduct as "fair," and his work productivity as "fair." In fact, Mr. Hernandez's lengthy tenure of employment with Hughes was unblemished by any significant disciplinary or performance issues, except for two problems relating to absenteeism caused by alcoholism and substance abuse in 1986 and 1991.

Specifically, in August of 1986, Hughes was contemplating disciplining Mr. Hernandez for absenteeism. When Mr. Hernandez informed Hughes that he was suffering from alcoholism, Hughes offered him the option of entering an alcoholic treatment program or being terminated. When a physician subsequently examined Mr. Hernandez and diagnosed him as suffering from "alcohol dependence," Mr. Hernandez admitted himself to a residential alcohol and substance abuse treatment center (Cottonwood de Tucson) in Tucson, Arizona on August 11, 1986. Once in treatment, it was also determined that Mr. Hernandez was "cannabis dependent" and a "cocaine user/abuser." After successfully completing thirty days of intensive in-patient therapy at the center, Mr. Hernandez went back to work for Hughes without incident.

About five years later, Mr. Hernandez's addiction to alcohol and drugs resurfaced. On July 11, 1991, Mr. Hernandez's supervisor thought that he smelled alcohol on Mr. Hernandez's breath and consequently instructed him to undergo a drug screen.[1] After the drug screen returned

1. Hughes's petition claims that Mr. Hernandez "exhibited signs of substance abuse" at work. *See* Petition, p. 2. In fact, the only "sign of substance abuse" that Mr. Hernandez displayed was the belief by (Cont'd)

positive for cocaine, Mr. Hernandez voluntarily resigned from his employment with Hughes on July 12, 1991.

Mr. Hernandez's only misconduct on the job immediately prior to his resignation consisted of testing positive for cocaine. He had not engaged in any other misfeasance or nonfeasance in the workplace prior to his resignation that would have given rise to his termination by Hughes.

In April 1992, Mr. Hernandez became a "good and active" participant in the recovery program of Alcoholics Anonymous. Mr. Hernandez also began attending the Latin Free Methodist Church in Tucson in August 1992, and was baptized as a "faithful and active" member of the Church on October 11, 1992.

Since early July 1992 to the present, Mr. Hernandez "has been clean and sober and has used no alcohol or drugs or otherwise engaged in any conduct constituting substance abuse." In short, after Mr. Hernandez resigned from Hughes after more than twenty-five years of service to the Company, he turned his life around and forswore drugs and alcohol.

His sobriety now intact, on January 27, 1994, Mr. Hernandez wanted to get back to work and applied for the position of Product Test Specialist with Hughes. Mr. Hernandez had previously successfully performed this position at Hughes and there were as many as seven openings for the job.

(Cont'd)
a supervisor that Mr. Hernandez smelled of alcohol, which in most cases is not a sign of drug abuse. Mr. Hernandez's drug screen was negative for alcohol and there is no evidence that the traces of cocaine found in Mr. Hernandez's urine sample had any impact on his work performance.

Mr. Hernandez's employment application to Hughes contained a letter written on his behalf by Mr. John L. Lyman, M.S. Mr. Lyman has worked with recovering alcoholics for many years, and he worked with Mr. Hernandez at Alcoholics Anonymous.

In a letter dated April 26, 1993, Mr. Lyman wrote that:

> I have known Mr. Hernandez for almost a year. I have seen him occasionally at his place of employment and frequently at meetings of Alcoholics Anonymous.
>
> I have worked with recovering alcoholics for ten years and have screened people for the New Hampshire Department of Motor Vehicles and referrals from state and federal parol boards, among my other duties.
>
> I volunteered to write you in behalf of Joel Hernandez as I have seen steady and consistent progress in his recovery from this disease.
>
> Joel attends A.A. regularly, participates in discussion when appropriate, is maintaining his sobriety, and is all in all a good and active member.
>
> Alcoholics Anonymous has clearly been demonstrated as the best recovery tool for alcoholics and Joel's commitment to the program demonstrates to me his willingness to accept responsibility for his recovery.
>
> In summary, I would heartily recommend Joel Hernandez for any position for which he is

> qualified. He is a diligent and caring individual who seems to merit a second chance. You may, if you wish, contact me at home for further information since I am not currently in formal practice due to health problems.
>
> Sincerely,
> John L. Lyman

Mr. Hernandez's application package thus provided Hughes with direct notice that, although he suffered from the disease of alcoholism, he was "maintaining his sobriety" and "actively" and "regularly" participating in Alcoholics Anonymous.

A labor relations representative at Hughes, Ms. Joanne Bockmiller, subsequently pulled Mr. Hernandez's personnel file and reviewed his application package. Although Mr. Hernandez disclosed the fact that he was a recovering alcoholic in his application materials, Hughes did not inquire as to the history and status of Mr. Hernandez's recovery or request that he undergo a drug or alcohol screen. Hughes also did not allow Mr. Hernandez to take any qualification tests related to the position for which he applied, although Mr. Hernandez had already passed these tests during his previous tenure of employment with Hughes.

Mr. Hernandez's application was later summarily rejected by Hughs without explanation sometime in early 1994.[2]

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2. Approximately five years later, on March 19, 1999, Hughes allowed Mr. Hernandez to take a qualifications test for the position of Product Test Specialist. Although Mr. Hernandez had passed the test before he resigned from Hughes in 1992, he failed the test in 1999. It is undisputed that Hughes did not allow Mr. Hernandez to take the test when he applied for re-employment with Hughes in 1994.

(Cont'd)

After Hughes denied Mr. Hernandez's application for re-employment, Mr. Hernandez filed a timely Charge of Discrimination with the United States Equal Employment Opportunity Commission alleging that Hughes violated his rights under the American with Disabilities Act.

In its first official written response to Mr. Hernandez's Charge of Discrimination, on July 15, 1994, Hughes informed the EEOC that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.*" [Emphasis added.] Hughes further explained that:

> Section 1630.3(b) of the ADA provides that the term "disability" and "qualified individual with a disability" may not exclude an individual who: has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs; or an individual who is participating in a supervised rehabilitation program and is no longer engaging in such use. *However, this provision is not applicable to this situation as [Mr. Hernandez] has provided no evidence to demonstrate he has either successfully completed or is currently undergoing drug rehabilitation.*[3]

(Cont'd)

As the Court of Appeals concluded below, because Mr. Hernandez had previously passed the test and successfully held the position of Product Test Specialist, only a finder of fact can determine whether he was qualified for the position in 1994 when he applied for it.

3. Of course, Mr. Lyman's letter of April 26, 1993 regarding Mr. Hernandez's participation in Alcoholics Anonymous constituted the very evidence of rehabilitation that Hughes claimed that Mr. Hernandez had failed to provide.

[Emphasis added.] Thus, in its first attempt to justify its rejection of Mr. Hernandez's job application, Hughes candidly *admitted* that it rejected the application because of Mr. Hernandez's record of previous "drug use" and an alleged lack of evidence demonstrating his "successful drug rehabilitation."

In November of 1997, the EEOC issued a Letter of Determination finding reasonable cause to conclude that Hughes had violated Mr. Hernandez's rights under the Americans with Disabilities Act.[4] The EEOC's Letter of Determination found that:

> Examination of the evidence reveals [that Mr. Hernandez] was previously employed by [Hughes] for approximately 20 years. He held various positions in which he successfully performed the job functions required of a Product Test Specialist. On July 15, 1991, he resigned in lieu of discharge as a result of testing positive for alcohol and illegal drugs. In January 1994, [Hughes] had seven openings for Product Test Specialist. On January 27, 1994, [Mr. Hernandez] submitted his resume to [Hughes] for consideration for one of these positions. The evidence indicates that at the time of his application [Mr. Hernandez] submitted a statement to [Hughes] indicating he

4. In one of its most recent opinions considering Title VII of the Civil Rights Act, this Court noted that the EEOC issues Letters of Determination finding "reasonable cause" of discrimination in only approximately eleven percent of all charges of discrimination filed with the EEOC. *See Equal Employment Opportunity Commission v. Waffle House, Inc.*, 122 S. Ct. 754, 762 n.7 (2002). Hughes did *not* object to the introduction of the EEOC's Letter of Determination in favor of Mr. Hernandez in the proceedings below.

was recovered and no longer an illegal drug or alcohol user. The evidence shows [that Hughes] rejected [Mr. Hernandez's] application based on his record of past alcohol and drug use.

The Americans with Disabilities Act states that an employer may not deny employment to a drug addict or alcoholic who is not currently using drugs or alcohol and has been rehabilitated, because of a history of drug addiction or alcoholism. In this instance, [Hughes] denied employment to [Mr. Hernandez] because of his history of drug and alcohol abuse. Accordingly, I find reasonable cause to believe that [Mr. Hernandez] was denied hire to the position of Product Test Specialist because of his disability.[5]

After the EEOC's efforts to resolve this dispute by means of conciliation failed, Mr. Hernandez filed a civil action against Hughes in the United States District Court for the District of Arizona in Tucson, Arizona.

Hughes ultimately moved the district court to enter summary judgment against Mr. Hernandez's claims, contending for the first time that it had rejected Mr. Hernandez's application based on an "unwritten" "informal" policy of prohibiting employees terminated for misconduct from ever working for Hughes again.[6] Of course, this belated assertion contradicted

5. The EEOC'S Letter of Determination was signed on behalf of the Commission by its District Director, Mr. Charles D. Burtner

6. On page six of its petition, Hughes asserts that "[m]any companies disqualify discharged persons from rehire." There is nothing in the record to support that assertion or the related contentions that follow it.

Hughes's earlier express admission to the EEOC that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.*"

Moreover, Hughes could not identify the origin, history, scope, or purpose of the alleged unwritten policy prohibiting the rehiring of employees terminated for violating company rules.

In stark contrast to Hughes's alleged unwritten policy regarding the re-employment of terminated employees, Hughes's written, formal personnel policies provided that if an applicant for employment tested positive for drugs or alcohol, the applicant is rendered ineligible for employment with Hughes for just the next twelve months, not forever. Similarly, Hughes's written personnel policies provided that an applicant who admitted to former drug or alcohol use could nonetheless be considered for immediate employment if the drug screen of the applicant returned negative. Hughes's written personnel policies also did not require that employees testing positive for illegal drugs be terminated.

Thus, Hughes's alleged "unwritten" "informal" policy barring Mr. Hernandez's re-employment was at odds with its written, formal personnel policies regarding drug abuse *and* the written formal explanation that Hughes provided to the EEOC on July 15, 1994. Under these circumstances, the very existence of the alleged unwritten policy was suspect.

Hughes also argued that the person who actually rejected Mr. Hernandez's job application, Ms. Joanne Bockmiller, did not know that he suffered from alcoholism or that he had resigned from Hughes after testing positive for cocaine. However, Ms. Bockmiller's assertions in this regard were

belied by the fact that John Lyman's letter regarding Mr. Hernandez's participation in Alcoholics Anonymous was part of Mr. Hernandez's application packet. In addition, Ms. Bockmiller admitted that she had pulled Mr. Hernandez's entire personnel file (which included his history of treatment for alcohol and drug addiction) when she received his application package.

Ignoring the various factual disputes regarding the motivation underlying Hughes's rejection of Mr. Hernandez's job application, the district court granted Hughes's motion for summary judgment without explanation and dismissed Mr. Hernandez's complaint.

Mr. Hernandez timely appealed from the district court's judgment.

Based on Hughes's express admission that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation*," the Court of Appeals concluded that a material factual dispute precluded summary judgment in Hughes's favor and remanded the case to the district court for trial.[7]

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7. Notwithstanding Hughes's contention to the contrary at page six of its petition, the Court of Appeals did not hold that "the ADA confers preferential treatment upon individuals who are fired for drug-related misconduct." The Court of Appeals stated only (in dicta) that Hughes could not impose a blanket prohibition on the re-employment of rehabilitated alcoholics and drug addicts whose only previous misconduct consisted of testing positive for alcohol or illegal drugs when formerly employed by the Company.

REASONS FOR DENYING THE PETITION

Material factual disputes render this case inappropriate for review.

This case is not ripe for review. The Court of Appeals was correct in concluding that several material factual disputes preclude the summary disposition of this litigation. Before these factual disputes are actually resolved by a finder of fact, the abstract legal question which Hughes asks this Court to review is necessarily hypothetical. Indeed, depending upon how a jury ultimately resolves the various factual disputes in this case, the question presented in Hughes's petition for certiorari may be rendered completely moot.

In short, Hughes is asking this Court to render an advisory opinion based on hypothetical facts that a finder of fact might ultimately reject at trial.

The central factual dispute in this case concerns the motivation underlying Hughes's rejection of Mr. Hernandez's job application. Mr. Hernandez contends — and Hughes's statement to the EEOC admits — that Hughes refused to rehire him because he is a recovered alcoholic/drug addict and that Hughes did not believe that he was rehabilitated. Seeking to avoid the legal consequences of its initial admission to the EEOC, Hughes now claims that an "unwritten" "informal" policy of not rehiring employees "terminated" for violating company rules was the actual reason why it rejected Mr. Hernandez's application.

In order for this Court to even consider the question presented by Hughes's petition, the Court must first resolve at least three material factual disputes in Hughes's favor.

First, the Court must at least tentatively find that Hughes's alleged "unwritten" policy of never rehiring employees terminated for violating company rules actually existed at the time when Hughes rejected Mr. Hernandez's job application. However, because a jury might ultimately determine that Hughes's purported unwritten policy did not exist as a matter of fact, any decision by this Court regarding this issue at this time would necessarily be advisory in nature.

Second, this Court would also have to find that Hughes actually terminated Mr. Hernandez because Hughes's alleged unwritten policy regarding the re-employment of terminated employees does not apply to employees who quit. In the proceedings below, Mr. Hernandez testified that he voluntarily resigned from his employment with Hughes. Although Hughes now claims that, pursuant to yet another one of its "unwritten" "informal" policies, Mr. Hernandez's resignation was the functional equivalent of termination, a jury could reasonably conclude that Hughes's contentions in this regard are not credible and are merely a smoke-screen to obscure Hughes's discriminatory rejection of Mr. Hernandez's application for employment.

Third, even if this Court were to find: (1) that Hughes's alleged unwritten policy regarding the re-employment of terminated employees in fact exists; and (2) that Hughes actually terminated Mr. Hernandez, the Court will still have to resolve the question of whether or not Hughes's unwritten policy regarding the re-employment of terminated employees

was a legitimate workplace rule applied in good faith or was misused by Hughes as a pretext for discriminating against Mr. Hernandez based on his record of alcohol and drug addiction and Hughes's fear that his rehabilitation might be short lived.

Indeed, based on the direct evidence of Hughes's discriminatory intent in this case — consisting of Hughes's admission that "Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation" — only a finder of fact can properly resolve the questions surrounding Hughes's intent in rejecting Mr. Hernandez's application.[8]

Lastly, Hughes's sustained request for this Court to either sit as a finder of fact or render an advisory opinion regarding hypothetical facts also disregards this Court's long standing rules governing summary judgment. As this Court recently acknowledged in *Board of Education v. Earls*, 122 S. Ct. 2259, 2575 (2002), "[o]n summary judgment the inferences to be drawn from the underlying facts contained in affidavits, attached exhibits, and depositions must be viewed in the light most favorable to the parties opposing the motion."

This Court should reject Hughes's invitation to invert these principles by resolving disputed facts and inferences in its favor. As the Court of Appeals correctly concluded, this dispute must be resolved by a finder of fact at trial.

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8. Hughes's contention on page ten of its petition that the opinion of the Court of Appeals in this case creates "a conflict in the Circuits on the validity of no-rehire rules" is similarly unfounded. The Court of Appeals concluded only that a material factual dispute regarding the issue of Hughes's intent in denying Mr. Hernandez's job application precluded summary judgment. This certainly is not a novel conclusion and does not conflict with any case authority from the courts of appeal.

CONCLUSION

For the reasons set forth above, this Court should deny Hughes's petition for certiorari.

Respectfully submitted,

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